A

Omar bin Othman v Kulim Advanced Technologies Sdn Bhd (previously known as KTPC Technologies Sdn Bhd)

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-02(A)-936–05 OF 2017
HAMID SULTAN, BADARIAH SAHAMID AND MARY LIM JJCA
15 OCTOBER 2018

C *Labour Law — Employment — Termination — Appellant was terminated from employment effective immediately with three months' salary and allowances in lieu of notice — Industrial Court held that it was termination simpliciter — Judicial commissioner quashed decision of Industrial Court — Whether it was termination simpliciter — Whether termination of appellant contrary to s 20 of*
D *the Industrial Relations Act 1967 — Whether appellant terminated with just cause and excuse — Whether termination unlawful — Whether fit and proper case for judicial commissioner to intervene with decision of Industrial Court — Industrial Relations Act 1967 s 20*

E The appellant was employed by the respondent for a two-year term from April 2011. Vide a termination letter dated 23 July 2013, the appellant was terminated by the respondent effective the same day with three months' salary and allowances in lieu of notice. The reason for termination, as stated in the termination letter, was based on a contractual right to terminate pursuant to
F article 3 of the conditions of contract. The issue was referred to the Industrial Court. The Industrial Court had found the case to be one of termination simpliciter and that the appellant had been unlawfully terminated. Dissatisfied with the decision, the respondent filed a judicial review application. The learned judicial commissioner found that it was not a case of termination
G simpliciter; and that the appellant had not objected to the termination and had in fact proceeded to accept the payment given in lieu of notice. The learned judicial commissioner quashed the decision of the Industrial Court, hence, the present appeal.

H **Held**, allowing the appeal, setting aside the High Court's order and reinstating the Industrial Court's award:

(1) Whether it was indeed a 'termination simpliciter' depended on the facts and evidence before the Industrial Court, notwithstanding the Industrial
I Court might not had given proper or cogent reasons. The issue being related to facts and evidence and that too in relation to a decision of the Industrial Court, the High Court ought not ordinarily intervene as it was not an appeal process (see para 6).

(2) The court agreed with the appellant that in the law of industrial relations,

pleas of estoppel, res judicata, acquiescence, waiver or laches, were regarded as technicalities which were passed over in favour of the substantive merits in the case and where principles of equity and good conscience prevail (see para 10).

(3) The notice of termination impinged on s 20 of the Industrial Relations Act 1967 as well as settled principles enunciated by case laws. Whether it was probationary period, fixed term contract, etc, where termination took place before the expiry of the term, it was incumbent on the employer to demonstrate that the dismissal was based on just cause and excuse. Otherwise, the termination was unlawful and could not stand. This was not a fit and proper case for the learned judicial commissioner to have intervened in the decision of the Industrial Court (see paras 11–12).

[Bahasa Malaysia summary

Perayu bekerja dengan responden bagi tempoh dua tahun dari April 2011. Melalui surat penamatan perkhidmatan bertarikh 23 Julai 2013, perayu diberhentikan kerja oleh responden berkuat kuasa hari yang sama dengan gaji tiga bulan dan elaun sebagai ganti notis. Sebab bagi penamatan perkhidmatan, seperti yang dinyatakan dalam surat penamatan perkhidmatan, adalah berdasarkan hak kontraktual untuk menamatkan perkhidmatan berikutan artikel 3 syarat-syarat kontrak. Isu ini telah dirujuk kepada Mahkamah Perusahaan. Mahkamah Perusahaan mendapati kes adalah satu penamatan ambil mudah dan bahawa perayu telah ditamatkan perkhidmatan secara tidak sah. Tidak puas hati dengan keputusan tersebut, responden memfailkan permohonan semakan kehakiman. Pesuruhjaya kehakiman yang bijaksana mendapati bahawa ia bukan kes penamatan ambil mudah; dan bahawa perayu tidak membantah kepada penamatan perkhidmatan tersebut dan telah sebenarnya terus menerima bayaran yang diberikan sebagai ganti notis. Pesuruhjaya kehakiman yang bijaksana membatalkan keputusan Mahkamah Perusahaan, maka, rayuan ini.

Diputuskan, membenarkan rayuan, mengenepikan perintah Mahkamah Tinggi dan mengembalikan semula award Mahkamah Perusahaan:

(1) Sama ada ia adalah sememangnya 'termination simpliciter' bergantung ke atas fakta dan keterangan di hadapan Mahkamah Perusahaan, meskipun Mahkamah Perusahaan mungkin tidak memberi alasan betul atau jelas. Isu adalah berkaitan kepada fakta dan keterangan dan ia juga berkaitan kepada keputusan Mahkamah Perusahaan, Mahkamah Tinggi tidak patut secara biasa campur tangan kerana ia bukan proses rayuan (lihat perenggan 6).

(2) Mahkamah bersetuju dengan perayu bahawa dari segi undang-undang perhubungan perusahaan, rayuan estopel, res judicata, akuiesens,

pengecualian atau laches, adalah dianggap sebagai alasan-alasan teknikal yang tidak diambil kira dalam memihak merit substantif dalam kes dan di mana prinsip ekuiti dan dengan kemurnian kekal (lihat perenggan 10).

(3) Notis penamatan perkhidmatan mencerobohi s 20 Akta Perhubungan Perusahaan 1967 dan juga prinsip-prinsip nyata yang ditetapkan oleh undang-undang kes. Sama ada ia adalah tempoh percubaan, kontrak jangka panjang, dan lain-lain, jika penamatan perkhidmatan mengambil tempat sebelum tamat tempohnya, ia adalah wajib ke atas majikan untuk menunjukkan bahawa pembuangan kerja adalah berdasarkan atas sebab dan alasan adil. Jika tidak, penamatan perkhidmatan tersebut adalah salah dari segi undang-undang dan tidak boleh dipertahankan. Kes ini adalah kes yang tidak wajar bagi pesuruhjaya kehakiman yang bijaksana campur tangan dalam keputusan Mahkamah Perusahaan (lihat perenggan 11–12).]

Notes

For cases on termination, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1490–1504.

Cases referred to

Bennett Subash Peter v Bon Ton Sdn Bhd (Bon Ton Resort Langkawi) [2018] MLJU 1041; [2018] 6 AMR 225, CA (refd)
Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304, FC (refd)
Goon Kwee Phoy v J&P Coats (M) Sdn Bhd [1981] 2 MLJ 129, FC (refd)
Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129; [2002] 3 CLJ 314, CA (refd)

Legislation referred to

Employment Act 1955
Industrial Relations Act 1967 s 20

Appeal from: Judicial Review Application No 25–9–9 of 2016 (High Court, Alor Setar)

GL Ambrose (Aneera Chowdry with him) (Louis Ambrose Chambers) for the appellant.
Siti Rafidah bt Abdul Raof (Nurfarhana bt Fadzil with her) (Aswandi Hashim & Co) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant (employee) appeals against the decision of the High Court which had quashed the decision of the Industrial Court.

[2] The central argument before the High Court as well as the Industrial Court was related to the jurisprudence of 'termination simpliciter'. The memorandum of appeal reads as follows: **A**

1. The learned Judicial Commissioner erred in law and/or in fact in finding that the Industrial Court had acted irrationally and/or unreasonably in a *Wednesbury* sense and/or illegally and/or with procedural impropriety in arriving at its decision. **B**

2. The learned Judicial Commissioner erred in law and/or in fact when his Lordship disturbed and/or interfered with the Industrial Court's findings of law and/or fact which found that the Respondent had unlawfully terminated the Appellant's employment. **C**

3. The learned Judicial Commissioner erred in law and/or in fact when His Lordship disturbed and/or interfered with the Industrial Court's findings of law and/or fact which found that there was *termination simpliciter.* **D**

4. The learned Judicial Commissioner erred in law and/or in fact by failing to find, or failing to uphold the Industrial Court's finding that, terminating the Appellant's employment merely by giving notice, or paying in lieu thereof, without just cause or excuse, is a form of unlawful termination.

5. The learned Judicial Commissioner erred in law and/or in fact by: **E**

5.1 incorrectly taking into account the Respondent's purported grounds in making the Application for Judicial Review in the High Court, including the Respondent's purported argument that the termination was justified:

5.1.1 as the Respondent had provided the Appellant contractual payment in lieu of notice of termination of employment; and/or **F**

5.1.2 as there was a change of state government in Kedah.

5.2 incorrectly applying, or failing to apply, trite principles of law, including:

5.2.1 the laws in respect of when a decision of the Industrial Court is open to judicial review; **G**

5.2.2 the laws in respect of termination of employment and/ or *termination simpliciter,*

5.2.3 the laws in respect of fixed-term and permanent employment; and/or **H**

5.2.4 principles and limitations of pleadings.

6. The learned Judicial Commissioner erred in law and/or in fact when His Lordship failed to appreciate that the Industrial Court had properly applied the facts and law in discharging its duty and discretion in finding that: **I**

6.1 there was unlawful termination of the Appellant's employment; and

6.2 the Appellant was entitled to compensation for the same.

7. The learned Judicial Commissioner erred in law and/or in fact by failing to appreciate that the Appellant was entitled to the sum awarded by the Industrial Court in its discretion, if not more.

8. The learned Judicial Commissioner erred in law and/or in fact by failing to appreciate that there were apparent and/or serious irregularities with the Respondent's Application for Leave for Judicial Review and/or in the Application for Judicial Review.

PRELIMINARIES

[3] It is now well established that 'termination simpliciter' a concept of common law is not part of industrial jurisprudence of Malaysia — under the Industrial Relations Act 1967 ('the IRA 1967'). The concept may be relevant in limited circumstances under the Employment Act 1955.

[4] Termination simpliciter relates to the absolute common law right of an employer to terminate the employee pursuant to the terms of the contract. This common law right has been arrested by virtue of s 20 of the IRA 1967 which reads as follows:

> 20(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

[5] It is also well established that even in a 'probationary' period, termination must be anchored on the concept of just cause and excuse. In *Bennett Subash Peter v Bon Ton Sdn Bhd (Bon Ton Resort Langkawi)* [2018] MLJU 1041; [2018] 6 AMR 225, the Court of Appeal had observed:

> [9] Whether it is a permanent employee or one on probation, industrial jurisprudence does not permit arbitrary reasons for dismissal. The reasons for dismissal must be bona fide. The bona fide test need not be objective. It all depends on the facts and circumstances of the case. An honest reason as well as mutual agreement may be sufficient. A mutual agreement of termination based on lack of bona fide may not suffice to say there was indeed a just cause and excuse for dismissal. Industrial jurisprudence generally leans towards the employee as opposed to the employer. This biasness is one related to common sense as the employer and employee are not often seen to have equal bargaining powers. In *Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd* [1997] 1 MLJ 376; [1997] 3 CLJ 827, the Court of Appeal held:
>
> > An employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse. The requirement of bona fide is thus essential in his dismissal. If the dismissal is found to be a colourable exercise of the power to dismiss or a result

of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and set aside such dismissal.

[6] In the instant case, we found that the learned judicial commissioner took the view on the facts that it was not a case of termination simpliciter and thereby quashed the decision of the Industrial Court. The Industrial Court had found the case to be one of termination simpliciter and that the appellant had been unlawfully terminated. We take the view whether it was indeed a 'termination simpliciter' depends on the facts and evidence before the Industrial Court, notwithstanding the Industrial Court may not have given proper or cogent reasons. The issue being related to facts and evidence and that too in relation to a decision of the Industrial Court, the High Court ought not ordinarily intervene as it is not an appeal process.

BRIEF FACTS

[7] The appellant was employed by the respondent for a two year term from April 2011. The term was extended in March 2013. The appellant's salary and allowance amounted to RM14,000. By a termination letter dated 23 July 2013, the appellant was terminated effective the same day with three months' salary and allowances in lieu of notice. The said letter of termination reads as follows:

No. Rujukan : ktechno/corp/hr/olc/05

Tarikh : 23 Julai 2013

Tuan Hj Omar bin Othman

B31, Jalan Sejati 3/1

Taman Sejati Indah

08000 Sungai Petani

Kedah

Tuan,

PENAMATAN PERKHIDMATAN SEBAGAI KETUA PEGAWAI EKSEKUTIF KTPC TECHNOLOGIES SDN BHD (KTECHNO)

Saya dengan segala hormatnya ingin menarik perhatian tuan kepada perkara di atas.

Mesyuarat Lembaga Pengarah KTECHNO yang bersidang pada tarikh 22 Julai 2013 memutuskan perkhidmatan tuan sebagai Ketua Pegawai Eksekutif ditamatkan berkuatkuasa pada tarikh 23 Julai 2013 sejajar dengan peruntukan dalam 'Article 3, Part III, Conditions of Employment', Terma & Syarat Kontrak Perkhidmatan KTECHNO.

Sehubungan dengan itu merujuk kepada 'Article 3, Part 111, Conditions of Employment' tuan dibayar gaji ganti notis tiga (3) bulan dan akan dibayar dalam tempoh tujuh (7) hari daripada tarikh surat ini dikeluarkan.

Saya bagi pihak Lembaga Pengarah dan kakitangan KTECHNO mengucapkan terima kasih di atas sumbangan dan perkhidmatan tuan di KTECHNO.

Sekian.

Dengan hormatnya

KTPC TECHNOLOGIES SDN BHD

(t/t)

DATO' HJ ABDUL RAHMAN BIN IBRAHIM, DSDK, AMK, BCK

Pengarah

_____

Saya mengaku menerima surat dan memahami isi kandungannya.

Tandatangan : (t/t)

Nama : Hj Omar bin Othman

Tarikh : 23-07-13

PAYMENT IN LIEU OF 3 MONTHS NOTICE

HJ OMAR BIN OTHMAN

KTPC TECHNOLOGIES SDN BHD

Basic Salary Allowance	11,000.00	
Petrol	500.00	
Transport	500.00	
Subsistance	2,000.00	
Housing	-	
Entertainment	-	
	14,000.00	
3 months salary in lieu of notice		42,000.00
Balance of annual leave as at 31 October 2013 9 days		3,807.69
		45,807.69
Less: EPF Contribution		5,040.00
SOCSO Contribution		
PCB		
TOTAL AMOUNT TO BE PAID		40,767.69

Prepared by: Approved by:

(t/t)

Norizan bt Dollah Dato' Abdul Rahman bin Ibrahim

[8] The said article 3 of the conditions of contract reads as follows:

ARTICLE 3 — TERMINATION OF SERVICES & RESIGNATION

The service of an employee may be terminated at any time by the Company without assigning any reason for willful breach of the terms and conditions of employment, committing criminal offenses, misconduct and indiscipline.

On resignation or termination of service, an employee shall surrender all documents, records, files, keys, vehicles (if any) and other assets belonging to the Company and settle all outstanding liabilities, loans and other obligations to the Company.

Executives

All executives intending to resign from the service of the Company are to give three (3) months notice in writing or pay three (3) months salary in lieu of notice.

The company shall give similar notice or make similar payment in lieu of notice as indicated in paragraph 1 above if it wishes to terminate the service of an executive.

Non-Executives

The period of notice for termination/resignation of employment shall be one (1) month notice or one (1) month salary in lieu of notice. The company shall give similar notice or make similar payment in lieu of notice as indicated in paragraph 1 above if it wishes to terminate the service of a non- executive.

[9] In essence, the employer's reason for termination was based on a contractual right to terminate pursuant to 'Article 3'. The termination was not based on poor performance, misconduct, redundancy, etc so as to demonstrate a prima facie case to terminate on just cause and excuse pursuant to s 20 of the IRA 1967.

[10] The respondent had argued and the learned judicial commissioner had agreed that the appellant had not 'objected' to the termination and had in fact proceeded to accept the payment given in lieu of notice. We agreed with the appellant that in the law of industrial relations, pleas of estoppel, res judicata, acquiescence, waiver or laches, are regarded as technicalities which are passed over in favour of the substantive merits in the case and where principles of equity and good conscience prevail (see *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129; [2002] 3 CLJ 314).

[11] The notice of termination impinges on s 20 of the IRA 1967 as well as settled principles enunciated by case laws. Whether it is probationary period, fixed term contract, etc where termination takes place before the expiry of the term, etc; it was incumbent on the employer to demonstrate that the dismissal was based on just cause and excuse. Otherwise, the termination is unlawful and cannot stand. Support for the proposition is found in a number of cases. To name a few are as follows:

(a) in *Goon Kwee Phoy v J&P Coats (M) Sdn Bhd* [1981] 2 MLJ 129, HRH Raja Azlah Shah CJ (as His Lordship then was) observed:

A We do not see any material difference between termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

(b) in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, the Federal Court, inter alia, held:

D 3. The Industrial Court in this case had come to a finding of fact that the motive for the termination of the services of the appellant was oblique and therefore it was justified in holding that the appellant had been dismissed without just cause or excuse.

E **[12]** We took the view that this is not a fit and proper case for the learned judicial commissioner to have intervened in the decision of the Industrial Court. In consequence, we allowed the appeal and ordered the High Court order to be set aside and the Industrial Court award to be reinstated.

F We hereby ordered so.

Appeal allowed; High Court's order set aside; Industrial Court's award reinstated.

Reported by Dzulqarnain Ab Fatar

G

H

I